
IN THE

United States Circuit Court of Appeals.

NINTH CIRCUIT.

CONSOLIDATED PIEDMONT CABLE COMPANY,

Appellant,

VS.

PACIFIC CABLE RAILWAY COMPANY,

Appellee.

No. 50.

BRIEF OF APPELLEE.

WM. F. BOOTH,

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FILED

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UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

CONSOLIDATED PIEDMONT CABLE COMPANY,

APPELLANT,

vs.

PACIFIC CABLE RAILWAY COMPANY,

APPELLEE.

BRIEF OF APPELLEE.

This is an appeal from the interlocutory decree of the Circuit Court of the United States for the Northern District of California, adjudging infringement of Claim 3 of the letters patent sued on, awarding an injunction and referring the case to the Master in Chancery for an accounting, all in usual form.

The first four assignments of error made by appellant herein relate to the same matter and are substantially the same in scope. The decree of the Circuit Court holding infringement of Claim 3 is the error alleged in the first assignment. To be an infringement the Court held that the infringing device contained the combination of Claim 3 and this is the second assignment of error. To contain the same combination the Court held that the infringing device employed for one element of the combination a mechanical equivalent, and this is the third assignment of error, and finally, holding that the infringing device contained the same combination, the Court found that said device effects substantially the same result in substantially the same way and this is the fourth assignment of error. These four can therefore be answered together.

A copy of the patent sued on is found at pages 48 to 53 of the Record on Appeal.

The 3d claim (page 52), is: "The combination with the shank E, as described, of the hinged clamping jaws e^3 , together with the operating slide F, its cross-bar f^2 , and bearing rollers f , as and for the purpose specified."

To fully understand the mechanism set forth in this claim, a brief description of the patented grip, in so far as it relates to the subject matter of the claim will not be out of place. This description refers both to the patent and to model "Complainant's Exhibit B."

A cable clamp or grip consists of three essential parts, namely:

a frame, usually termed a "shank," which is carried by the car, and extends downwardly through the slot in the top of the tube or tunnel in which the cable travels; suitable jaws carried upon the lower end of the shank within the tube or tunnel, and adapted to grasp and to release the cable, and suitable power mechanism for closing and opening the jaws.

In the patent in suit, the first of these parts, namely, the shank, is designated by the letter E.

The second part, namely, the jaws, is lettered e^3 . In these is a circular opening lettered b^1 , formed by semicircular recesses or channels in the adjacent faces of the jaws. In this opening the cable fits, and is grasped by the jaws when closed, and released when opened. These jaws swing to and from each other to close and open, and to do this are hinged at their upper ends to the lower end of the shank E, the hinging being effected by a single bolt, which passes through eyes in the bottom of the shank and eyes in the tops of the jaws. The jaws therefore swing from the same center.

The third part, namely, the mechanism to close and open the jaws, consists of several devices. These are the slide bar F. This is a long bar, which is fitted to the shank E, and may be raised up and down therein. The means of raising and depressing it may be of any suitable character, usually a lever and connections in some form. The lower end of the slide bar F is formed or provided with a cross-piece or bar designated by f^2 . In each end of the cross-piece is fitted a small axle or pin f^1 , and upon the ends of the pins are journaled rollers f . These rollers f bear upon the outer surfaces of the jaws e^3 .

Now it will readily be seen that if the slide bar F be forced down, the cross-piece f^2 at its foot will be moved down also. Then, as the rollers f are carried by the cross-piece, they will move down, and as they bear on the outer surface of the jaws, and are moving down in vertical planes, it is evident that they must force the jaws inwardly towards each other, said jaws swinging on their common hinge bolt above. Thus the jaws are closed to grasp the cable between them in the opening b^1 . To open the jaws again, the patent discloses the following means: A pin shown in Fig. 1, and lettered e^5 , is connected to one of the hinge eyes of the jaws and projects above one of the rollers f . These pins are better shown in model, complainant's Exhibit B. By looking at this model, it will be seen that when the slide bar F is raised and the rollers f are thereby lifted, one of these rollers of each jaw will bear up under the pin e^5 just above it, and by raising said pins will positively swing the jaws open and release the cable.

The grip of appellant is shown by the model, "Complainant's Exhibit C."

It will be seen that it has a shank. This shank corresponds to the shank E, of complainant's patent. It has jaws which are hinged to the lower end of the shank, by means of a single bolt common to both, so that the jaws swing from the same center. Between the jaws is the opening for the reception of the cable. These jaws correspond to the jaws, e^2 , of the patent, and the opening between them corresponds to the opening, b^1 , of the patent. It has a slide bar fitted to the shank and adapted to be moved up and down by suitable lever appliances above. This slide bar corresponds to the slide bar, F, of the patent. The slide bar has at its lower end a cross-piece or bar which corresponds to the cross-piece or bar, f^2 , of the patent. The ends of this cross-piece or bar have holes in which are carried devices or means which, acting on the jaws, effect their operation both to swing them together and to open them. These devices or means consist of the pins or rollers which are loosely mounted in the holes in the ends of the cross-piece or bar, and also loosely mounted in holes in the jaws. The correspondence or similarity of these freely playing pins or rollers, to the rollers f of the patent, assumes a three-fold aspect, in view of any one of which, patentable identity as to infringement is conclusively demonstrated.

I.

The first view to be considered grows out of that general proposition of patent law that both the specification and claim of a patent are to be liberally construed, and such a construction put upon the latter as will make it co-extensive with the invention.

This is the true construction. *Weston vs. Nash*, 1 Holmes, 488. *Winans vs. Denmead*, 15 How., 330. (See page 341.)

It is contended by appellee in the first view to be considered, that Claim 3 of the patent sued on can and should properly be construed to cover a combination consisting of four elements, namely: 1st, a shank; 2d, hinged clamping jaws; 3d, operating slide; and 4th, suitable means by which the power of the operating slide is transmitted to effect the operation of the hinged clamping jaws. This construction can only be opposed by showing that in the prior art grips were known which had hinged clamping jaws operated by some connection with the slide.

Claims are always construed in the light of the prior art. The first endeavor is to make them cover the real invention. This construction may be a broad one if the state of the prior art permit, or a narrower one if the scope of the art be limited.

Grier vs. Wilt, 120 U. S., 412.

Clough vs. Barker, 106 U. S., 166.

Applying this rule to the present case, it is claimed by appellee that the 3d claim of its patent is for a cable grip in which *hinged clamping jaws* are carried by a shank and are operated by means of a slide through suitable power-transmitting devices. There is nothing in the prior art to oppose this construction. There is nothing which shows a combination involving the feature of hinged jaws, carried by the same bolt and swinging from the same center. The claim cannot be made co-extensive with the invention unless a construction be put upon it which will cover the employment of any suitable means for operating those jaws from the slide.

The only evidence as to the prior art is found in the deposition of witness Bell, appellant's expert. (See testimony, Q. 21-23 and X.-Q. 22-26, pages 34 and 38 of Record.)

This evidence does not in the least prevent the Court from giving the construction to the claim which is here urged for it does not show even an equivalent combination.

Now if Claim 3 be construed as contended for, it will be seen that appellant's grip is an infringement, for it has every element of the claim. It has in combination, the shank, the hinged clamping jaws, the operating slide, and a means for transmitting the power of the slide to operate the jaws. The jaws of appellant's grip are hinged ones; they are pivoted by a bolt common to both, to the lower end of the shank; they swing from the same center and they are moved to and from each other by means of the slide bar acting through intermediate devices, which give to the jaws precisely the same swinging movement that the intermediate devices of the patented grip do. It could not be otherwise, for the jaws in both grips are similarly hinged to the shank and must move similarly.

II.

The second view arises from the doctrine of mechanical equivalents, and is that particularly taken by his Honor, Judge Hawley, in deciding the case.

In this view the claim itself stands as it is; its combination is complete as recited, but the doctrine of equivalents is invoked to prove that the infringing device contains the same combination, even though one of the elements of that combination differ in form and arrangement from the corresponding element of the patented combination.

The combination of the patent claim in this view is one made up of five elements, namely:

- 1st. Shank E.
- 2d. Hinged clamping jaws *e*³.
- 3d. Operating slide F.

4th. Its cross-bar f^2 .

5th. Bearing rollers f .

In appellant's grip are found:

1st. A shank.

2d. Hinged clamping jaws.

3d. An operating slide.

4th. Its cross bar.

5th. Loose pins whereby the jaws are operated.

Comparing these elements it will be seen that identity exists between the shanks of the two grips. Identity exists also between the jaws of the patented grip and those of appellant's grip in so far that they are both hinged clamping jaws occupying to the shank, to the cable, and to each other the same relative positions. They are jaws hinged at their upper ends to the shank, swinging from a common center and having therefore precisely the same movements.

The third element of the two combinations, namely, the operating slide, is identical. The fourth element, namely, the cross-bar of the operating slide, is also identical. The fifth element of the patented combination is the bearing rollers, f .

These are carried on the ends of the cross-bar of the operating slide, and they bear down on the jaws to close them, and they bear up on pins connected with and forming part of the jaws to open them. The fifth element of appellant's grip is the loose pins. These are cylindrical pieces of metal. *They are carried by the ends of the cross-bar of the operating slide, and they are fitted loosely in holes in the outer portions of the jaws. They bear down in these holes to close the jaws and they lift up in the holes to open the jaws.*

Appellee asserts that these loose pins working loosely in the holes of the jaws of appellant's grip are the mechanical equivalents of the rollers, f , of the patented combination, which bear down on the jaws to close them and bear up on the pieces or pins fixed to the jaws, to open them. His Honor, Judge Hawley, held that mechanical equivalence existed in this respect. (Page 13 of Record.)

To determine equivalence the Court is always entitled to make a comparison for itself of the devices in controversy.

Mason vs. Graham, 23 Wall., 261. (See page 275, top.)

The Court can see that the jaws in both grips are suspended from and hinged to the shank in the same manner and have the same function, and that in closing and opening they swing similarly; that the operating slide with its cross-bar is the same in both, and that the function of each, namely, to transmit the power to close and to open the jaws is identical; and finally, that the function of the loose pin connection between

the cross-bar of the operating slide and the jaws in the appellant's grip is the same as that of the roller connection between the cross-bar and the jaws in the appellee's grip, said function being to cause the jaws to swing towards each other to grip the cable and to separate to release it. It can also see that the mode of operation of these connections is the same, in that in both the closing is effected by a downward pressure upon the jaws, forcing them to swing inwardly about their common pivotal center, and the opening is effected by a lifting pressure, causing them to swing outwardly. It can also see that these connections are capable of serving the same purpose as integral parts of this form of grip, and it knows that a pin connection forming a joint between two parts is a thing of antiquity, or at least is as old as appellee's patent, for appellant's witness, Bell, says so. (See X-Q.'s 94 and 95, page 46 of Record.)

Thus mechanical equivalence is demonstrated.

For the doctrine of mechanical equivalents in the sense under discussion, see Robinson on Patents, Vol. 1, Secs. 246 and 247.

Capability of serving as a substitute is the first attribute of equivalence. The existence of such capability is not to be ascertained in the present case by regarding the devices claimed to be equivalents separately, and calling one a roller, and the other a pin. These devices must be looked at in connection with the combination of which they form integral parts.

Robinson on Patents, Vol. 1, Sec. 248.

Similarity of use shows equivalence; not dissimilarity in name, shape, size, capacity, proportions, arrangements or material.

Robinson, Vol. 1, Sec. 249.

The doctrine of mechanical equivalents is well settled by the Supreme Court.

See *Gill vs. Wells*, 22 Wall., 1. (See page 28.)

There are three attributes of a mechanical equivalent in a combination.

1st. The substituted ingredient or element must be an old one. That a pin connection forming a joint between two parts is old, witness Bell proves.

2d. The substituted element must perform substantially the same functions as the one omitted. That the pin connection of appellant's grip performs substantially the same function is evident from the testimony of appellee's witness Smyth (pages 15-18 of Record); from an examination of the two grips, and especially from an examination of the model, "Complainant's Exhibit D."

The function of the substituted element in appellant's grip is to transmit the power of the operating slide to operate the jaws. This is also the function of the omitted element in the appellee's grip. This function is performed in the same way, namely, by pressure down on the jaws to close them, and by a lifting pressure to open them, and the jaws swing in precisely the same way in the two grips.

3d. The substituted element must have been known at the date of appellee's patent to be a substitute for the omitted element.

That this is true of the pin connection of the appellant's grip and of the roller connection of appellee's grip cannot be doubted, as both are mechanical movements of great antiquity, of the simplest character and known as capable of producing similar effects.

See *Gray vs. James*, 1 Peters, C. C. Report, 394.

Thus we have shown that the substituted element of appellant's grip possesses every attribute of mechanical equivalence required by the rule in *Gill vs. Wells*.

The appellant seeks to show by its testimony that only one of the attributes of equivalents is absent, namely, the accomplishment of the same result. This it does by refinements of technical discussion as to the character of the pressure on the jaws in the two grips. Almost the whole of the testimony of witness Bell is directed to the object of showing that in appellee's grip there is a constantly increasing pressure on the rope as the rollers approach the horizontal plane thereof, while in appellant's grip there is no such increasing pressure. This does not prove anything material to the case, and only shows the inferiority of the appellant's grip. But the evident object of it all is to divert attention from the true function of the elements under discussion, which is to *transmit the power of the operating slide to open and close the swinging jaws*, and to direct it to a mere question of degree, namely, as to which element exerts the greater pressure. As to the rule of mechanical equivalents, we cite further:

Imhaeuser vs. Buerk, 101 U. S., 647.

Fuller vs. Yentzer, 94 U. S., pages 296-297.

Morley Sewing Machine Co. vs. Lancaster, 129 U. S., 263;
(see bottom of page 383).

Blake vs. Robertson, 94 U. S., 728.

In this last case the defense was made that the revolving shaft by which, through rods and levers, the movable jaw of the rock breaker of complainant's patent was operated was omitted by defendant from the combination, and instead thereof it used a pump which forced water to a cylinder, the pistons of

which operated the movable jaw. Of this the Court says (page 733): "What is so employed in appellant's machine is the obvious and exact equivalent of what is so dispensed with in the Blake machine."

In this case (*Blake vs. Robertson*), the part substituted and the part omitted differed widely, in themselves, and experts could show, and the Court even intimated that, differing in construction, they differed somewhat in mode of operation. But the Court recognized but one thing, namely, that they both had the same purpose, to wit: to operate the movable jaw, and this even though in the Blake machine the motion was a positive certain one, while in the infringing machine it was not so, just as in the present case the appellant tries to evade infringement by showing in appellee's grip a gradually increasing pressure, while there is none in its grip.

We cite also the opinion of this Court in *Norton vs. Jensen*, 49 Fed. Rep., at page 868.

An attempt was made to show by the evidence in the case at bar that one element, namely, the rollers of the combination of the claim sued on is entirely omitted and nothing at all substituted therefor. This is the object of witness Bell's testimony (Q.'s 32-36, pages 35 and 36 of the Record). It will be seen by reference to this testimony, that the idea is to show that in both grips there are the same number of jaws, similarly hinged, and operated by a slide with a cross-bar, and that in both grips there are pins secured to the cross-bar, and as a result:

"Q. 36.—Now, in the patented grip, is there the element of the friction rollers marked *f* in the patent which is not contained in the defendant's grip at all?"

"A.—There is."

This testimony means that in appellant's grip the witness finds the jaws of the patent, the shank, the slide and the cross-bar, and he likens the loose pins of that grip to the fixed pins upon which appellee's rollers are carried. The conclusion is, that therefore in appellant's grip there is nothing to compare with the rollers of appellee's grip, and that element is entirely omitted. The fallacy in this argument is apparent. *The loose pins of appellant's grip are not to be compared with the fixed pins of appellee's grip upon which the rollers are carried*, for their functions are dissimilar, and they are alike only in the name employed. That this is true, we direct attention to the cross-examination of witness Bell (Q. 1 to 12, pages 36 and 37 of Record), wherein it appears that the roller-supporting pins of appellee's patent do not operate the jaws, but that the rollers do, and that if the rollers were not present, the pins would not touch the jaws. Therefore, as the rollers close the jaws in the appellee's grip, and as the loose pins close the jaws in appel-

lant's grip, these are the corresponding elements in the two grips, and the element of the roller in appellee's patented combination finds its equivalent in the element of the pins in the appellant's grip.

To the argument of appellant's counsel that the small pins upon which the rollers of appellee's grip are mounted should be read into the claim and form an element thereof, the answer is that the claim does not specify these pins, and the most that is necessary to include in the claim by implication *is a support for the rollers*. Granting that to be operative, the combination must include a support for the rollers, it does not follow that the claim should be confined to the particular support, to wit: the pins, especially as no mention is made of them in the claim. It is a common rule of construction that minor and well-known essential sub-parts need only be implied in a claim. In the present case the rollers are mentioned, and a suitable support for them is thereby implied, but not necessarily the pins, else they would have been expressly mentioned. Therefore let a suitable support for the rollers be implied or read into the claim, and the appellant's grip is still an infringement, because its loose pins, which correspond to the rollers, *find a suitable support in the holes in the cross-piece of the slide bar*. And further, even if the supporting pins of appellee's grip be read into the claim, we find an equivalent support *in the holes of the cross-piece of appellant's grip*, for what difference is there in supporting a roller by an axial pin or supporting it by a circumferential socket? Both are supports for the roller, and allow it to perform its function. This subject is not difficult if it be kept clearly in mind that the equivalent elements are the rollers and the loose pins, as these are the parts which operate the jaws. The loose pins of appellant's grip and the roller supporting pins of appellee's grip are not the corresponding elements, because their purposes are entirely different. The purpose of the roller supporting pins is merely to carry the rollers. This is the purpose of the holes in the cross-piece of appellant's grip, namely, to carry the loose pins: Thus the roller supporting pins and the holes are the means of connecting the rollers and the loose pins with the cross-piece in each grip.

Before closing this view of infringement it will be well to notice the argument of counsel for appellant that patentees of a *secondary* invention are not entitled to equivalents. If all that is meant by this is that where a first inventor has made a primary combination, and a second inventor has made another combination which differs from the first only in a change of elements, which however, and notwithstanding the change, involve the same arrangement, operate together in *the same way* and produce the same result, thus leaving it practically the

same idea of means, and then a third inventor makes a third combination differing from the first by the same character of change, then the position is correct.

But it is not correct where the second combination, though it may effect the same ultimate result as the first, is changed from the first essentially by *a new construction and arrangement of elements, thereby resulting in a different idea of means, a new mode of operation* and a new co-operative law. In such case, the second combination, though it may be secondary in ultimate result, *becomes primary in its new construction and arrangement*, as regards a third combination which changes from the second only in such particulars (as by mechanical equivalents) as still leaves it the same construction and arrangement, the same idea of means, and the same mode of operation or co-operative law as said second combination.

Such a second combination, call it secondary or not, is indisputably entitled to the doctrine of equivalents, for the result is not the essential thing to be considered, but the new construction and arrangement, resulting in the new idea of means, and the new mode of operation resulting in the new co-operative law, are the vital points. In *Imhaeuser vs. Buerk*, 101 U. S., at page 656, the Court says, referring to just such a combination: "Such a patentee may doubtless invoke the doctrine of equivalents as against an infringer of the patent; but the term 'equivalent,' as applied to such an invention, is special in its signification, and somewhat different from what is meant when the term is applied to an invention consisting of a new device or an entirely new machine."

Appellant's argument leads to the conclusion that every combination after a primary one, which merely effects the same result, is a secondary combination, and not entitled to equivalents. This would shut the door to the doctrine of equivalents to all washing machines after the first, because they all wash; to all subsequent seeding machines, because they all sow; to all following car-couplings, because they couple cars, and so on *ad infinitum*. This is manifestly not good doctrine, because all idea of change of arrangement resulting in a different co-operative law or a different idea of means is omitted. But such change constitutes such a new combination that said combination becomes primary as to any combination following which embraces the same arrangement, working as the same idea of means under the same co-operative law. Robinson, in Sec. 922, says: "The infringement of a combination patent, therefore, consists in the manufacture, use, or sale of any combination in which precisely the same elements *or their equivalents* are united under the same co-operative law."

We will venture the assertion that in nine-tenths of the cases

in which we find the doctrine of equivalents applied to combinations, it can be shown that such combinations thus receiving the benefit of this doctrine are not the first to effect merely the result sought, and if this alone rendered them secondary, they should not, according to appellant, be entitled to equivalents. But as they differ from previous ones in a different arrangement and co-operative law, they, as well as purely primary ones, are entitled to equivalents.

Applying these views to the facts of the present case, the Court will see that while the combination sued on is not the first to effect the general result, namely, to grip a rope, or in other words, is not the first grip, yet the prior art shown, namely, the Clay Street Hill grip, goes no farther than to show the fact that there was a prior grip. The testimony of Bell regarding this grip is very indefinite, but still it is certain that the combination sued on differs essentially from that grip in such a change in the construction and arrangement of its parts as results in a different co-operative law and a different idea of means. This was evidently the view taken of the matter by his Honor, Judge Hawley, when he said (page 13 of Record): "In this case, from all the testimony, I am satisfied that complainant is entitled to a liberal construction of the patent, and to the doctrine of equivalents."

This being the proper construction of the combination sued on, it will be seen that appellant's grip involves the same arrangement of parts, or their equivalents, working under the same co-operative law and involving the same idea of means as the patented combination.

Counsel for appellant have, in their brief, twice called attention to the fact that we allege the infringement of but one claim out of seven, and draw from this the argument that the appellant's grip must be constructed on a "very different plan and mode of operation from the grip of the patent." This conclusion is illogical; the premises do not warrant it. Not one of the other six claims of the patent is a claim for a combination covering the essential features resulting in the gripping of the cable. The patent describes, illustrates and covers in six of its claims various features in connection with the grip proper, and in one claim, namely, Claim 3, it secures the grip proper. Now, if appellant uses a grip like the combination of this claim, it cannot follow that this grip is constructed differently from the grip of the patent or that it has a different mode of operation, simply because appellant does not use in connection therewith the other inventions which the patentee thought best to secure by separate claims in the same patent. Much of appellant's brief is devoted to the discussion of the construction of a combination claim, showing that it does not

cover any of the separate elements nor any number of elements less than the whole. We have not argued otherwise. We have throughout set ourselves to show that appellant's grip embodies the entire combination of the claim sued on.

III.

The third view to be considered is that of substantial identity. This doctrine is distinguishable from mechanical equivalence as strictly defined even though the term "equivalence" is often applied to it. It means that a thing which affects substantially the same result in substantially the same way as another thing is, in the eye of the law, the same as that other thing. The inquiry is what does it do and how does it do it in the organism in which it is found?

This doctrine is fully stated in *Machine Co. vs. Murphy*, 97 U. S., 120. (See page 125.)

Applying the rule of this case it will be seen that the connection between the cross-bar of the operating slide and the jaws in the appellant's grip, is one which performs substantially the same function (to-wit: the swinging of the jaws), in substantially the same way (to wit: by pressing down and lifting up), to obtain the same result (to wit: the gripping and releasing of the rope). In this view we claim that the pins of appellant's grip are patentably, the same thing as the rollers of the appellee's grip.

The Court will see that the pin connection between the cross-bar of the slide and the jaws of appellant's grip is not an ordinary pivotal or hinge connection in which the pin fits snugly in its seat and simply forms an axis about which the connected parts can turn. If it were, the grip would not work, because the cross-bar moves in a right line and the jaws move in curved lines. (Witness Smyth's testimony, Q's. 10-16, pages 15 and 16 of Record.)

It differs from such ordinary pivotal connection in the fact that the holes in which the pins are seated are enough greater in diameter than the diameter of the pins, to allow the pins to work loosely therein and permit the jaws to move in curved lines while the cross-bar moves vertically. (Smyth, Q. 17, page 16 of Record.)

These pins in appellant's grip are quite large in diameter, and they work loosely in their seats. There is no doubt that they do move therein. Smyth (Q. 18, page 16), says they work as rollers. Bell (X.-Q. 55, page 42), says they have a rocking motion, and further (X.-Q. 59, page 42), that they do not bear on the same point in the hole of the jaw all the time in opening and closing the jaws, and that they get from one point of contact to another by rolling or rocking. (X.-Q. 60, page 42.)

It becomes evident, therefore, that in both grips the connection between the cross-bar of the operating slide and the jaws is a loose connection. (Smyth, Q. 29, page 17, as to complainant's, and Q. 15, page 16, as to defendant's grip.) This is necessary in both, to permit the vertically moving cross-bar to be connected with and still to operate the jaws, which move in curved lines.

In appellant's grip this loose connection is formed by holes larger than the pins which play freely in them. In appellee's grip it is formed by rollers playing loosely in a *bearing which is made up of all that portion of the circumference of a hole necessary to effect the results*. We call the attention of the Court particularly to this. Taking the model of appellee's grip in hand, it will be seen that if the pin under which the roller bears to open the jaw, were continued around and made to meet the jaw at a point below the roller, then a complete hole would be formed in which the roller would work loosely. (Smyth, Q's. 31 and 32, page 17 of Record.)

There is no necessity, however, for the complete hole, because enough of it is present, namely, top, inner side and bottom, to permit the roller to find the bearings necessary to push the jaw closed and to lift it open. (Smyth, Q. 33, page 17.)

Therefore if appellant's grip have a large hole in which a smaller pin works loosely, appellee's grip has such a hole and pin. The inclined surface of the jaw forms both the inner side and the bottom of the hole and the pin above forms the top of the hole. The action in both grips is substantially the same, the pins or rollers pressing down on the jaws to close them, and lifting up under them to open them. This certainly falls within the rule of substantial identity as the Supreme Court has expressed it in *Machine Co. vs. Murphy (ante)*.

How near the two devices are alike the Court can see from the diagrammatic model, "Exhibit D." This model shows on one side the jaws and rollers of appellee's grip, and on the other side, the jaws and the holes for the pins of appellant's grip. The jaws are operated and are so intended to be operated by the rollers on the appellee's grip side, in order to show that the holes for the pins on appellant's grip side are in position to permit of this operation, and consequently that the pins act the same as the rollers. (Smyth, Q's. 36 and 37, pages 17 and 18 of Record.)

This model will assist the Court materially in taking out of the work of comparison, immaterial differences in form, and showing the relative location and general mode of operation of the several parts.

With regard to this Model Ex. D, counsel pointed out that

the roller supporting pins of the appellee's side pass through to the appellant's side and appear to represent appellant's pins. He thereby supports his contention that these pins are corresponding elements. This is erroneous in this, that in that model, as before stated, it is intended to work the grip from the appellee's side, and that therefore these pins are mere roller supports, *and are fixed ones* being rigidly connected to the cross-piece. In this they differ from appellant's pins, because the latter are loose pins, and must be loose pins. The extension of the fixed roller supporting pins into the holes of appellant's side of the grip is therefore only for the purpose of showing the position of the loose rollers of that grip.

It becomes apparent, therefore, from all these considerations that the Circuit Court did not err in the four particulars assigned, and it follows that no error was made in the fifth particular, namely, in ordering an interlocutory decree against appellant, awarding an injunction and decreeing a reference to the Master for an accounting, because such decree was proper upon the pleadings in view of the conclusions at which the Court arrived.

Respectfully submitted.

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